(23)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 864

F. F. DOLLERT, ET AL
Petitioners

v.

PRATT-HEWIT OIL CORPORATION, ET AL
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, IN AND FOR THE FOURTH JUDICIAL DISTRICT OF TEXAS AT SAN ANTONIO, AND BRIEF IN SUPPORT THEREOF

ARTHUR H. BARTELT
Attorney for Petitioner
P. O. Box 190
Austin, Texas
DANIEL W. HOAN
152 W. Wisconsin Avenue
Mliwaukee, Wisconsin
Of Counsel
LUTHER M. BICKETT
Alamo Nat'l. Bank Bldg.
San Antonio, Texas
Of Counsel

FIRM FOUNDATION—AUSTIN

INDEX TO PETITION AND BRIEF

INDEX OF AUTHORITIES

Cases Cited — Page

Cases Cited — Page

Cases Cited — Page

Cases Cited — Page

Constitution of the United States Cited:

INDEX OF AUTHORITIES—(Cont'd.)

INDEX OF AUTHORITIES—(Cont'd.)

INDEX OF AUTHORITIES—(Cont'd.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. _____

F. F. DOLLERT, ET AL
Petitioners

v.

PRATT-HEWIT OIL CORPORATION, ET AL
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, IN AND FOR THE FOURTH JUDICIAL DISTRICT OF TEXAS AT SAN ANTONIO, AND BRIEF IN SUPPORT THEREOF

To the Honorable Harlan Fiske Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, F. F. Dollert, respectfully shows:

I.

Summary Statement of the Matter Involved

This petition presents one main jurisdictional is-

sue, namely, that the *refusal* of the Court of Civil Appeals to judicially determine the several motions of petitioner, (Tr. R. 1 to 3) which are all to the one effect, that the September 28, 1925 contract is void ab initio and the judgment entered thereon by the District Court on January 26, 1937, is void on its face, *necessarily constituted a taking and depriving* petitioner and the stockholders of the Pratt-Hewit Oil Corporation hereinafter at times referred to as Pratt-Hewit Corp., and the corporation itself of their valuable oil properties situated in Texas and giving them to the Houston Oil Company without any judicial determination of this issue, upon which determination alone such deprivation could be justified. Such procedure denied them

(a) the due process of law guaranteed to them by the 14th Amendment of the Constitution of the United States and

(b) also denied to petitioner and the stockholders "the privileges and immunities" to which they are entitled as citizens of the United States in violation of the 14th Amendment of the Constitution of the United States. *Fayerweather* v. *Ritch*, 195 U. S. 276, 25 S. Ct. 58, 49 L. Ed. 193. *Chicago, Burlington etc. R. R.* v. *Chicago*, 166 U. S. 226.

The foregoing issue and its sustaining sub issues, although determinative of the entire subject matter of the litigation and presenting purely jurisdictional questions which every court was in duty bound to pass upon before proceeding further, nev-

ertheless, have gone through the Federal and the State courts of Texas and have never been passed upon or even mentioned by a single court.

Furthermore, in all the briefs filed by the attorneys for the defendants, not one sentence has been written or one single case cited taking issue with petitioner's legal contention that the September 28, 1925 contract was void and never came into existence, that it could not be the basis of a legal proceeding or a judgment and that, therefore, the parties today stand in relation to each other as they stood before the contract was made. Still more astounding is it when the facts which petitioner has martialed to sustain his contentions are all to be found in the written instruments, contracts, and oil and gas lease assignments *entered into by the defendants*, the Houston Oil Company and Pratt, and the intermediary, A. D. Rooke, and sedulously secreted in the files in their offices until they were compelled to produce them by court order issued in the Federal District Court.

To a void contract and a judgment void on its face, neither lapse of time, laches, stale demand, estoppel, res adjudicata, limitations, ratification, confirmation, waiver, nor want of due diligence may be pleaded as a defense. 25 Tex. Jur. p. 693.

"In conclusion it should be noted that the principle of estoppel does not apply to an agreement which the law holds void as against public policy. The ratification of such a contract by acquiescence

or laches as nugatory as the contract itself." 9 Amer. Jur. 391.

"A void judgment 'is good nowhere and bad everywhere' and neither lapse of time *nor judicial action* can impart validity. It is not susceptible of ratification or confirmation, and its invalidity may not be waived." 25 Tex. Jur. Sec. 254, p. 693.

Vol. 1, Freeman on Judgments, 5th Ed., pages 643, 644, reads as follows:

"The fact that the void judgment has been *affirmed on review in an appellate court* or an order or judgment renewing or reviving it entered adds nothing to its validity."

"Nor will a void judgment be given effect of *res judicata* in a subsequent suit *involving the same subject matter*, *Ruby* v. *Dans*, Texas Civ. App. 277 S. W. 430;" 2 Black on Judgments, Sec. 513, 611.

"(Pa. Super. Ct.) It is never too late to attack a judgment for want of jurisdiction which appears on the face of the record. *Mintz* v. *Mintz*, 83 Pa. Super. Ct. 85"—17-3rd. Dec. Dig., p. 406.

"The invalidity of the judgment, however, does not affect the pendency of the suit in the District Court of Jones County. Its status is the same as though it had never been tried." *Ibill* v. *Stovall*, 92 S. W. 1067 2d (Tex. Civ. App.)

Affirmative defense, like the foregoing, cannot make legal a contract which is forbidden by statute or public policy or a judgment void on its face. Therefore, the foregoing affirmative defenses may not be pleaded in opposition to this petition for certiorari.

Petitioner F. F. Dollert is and ever since the Pratt-Hewit Oil Corporation was incorporated in April, 1923, has been a stockholder of that corporation. In July, 1943, petitioner filed a motion in the District Court of Refugio County, Texas in the case of W. E. Hewit et al versus Pratt-Hewit Oil Corporation, et al, No. 795, to vacate and set aside a pretended judgment entered in this action on January 26, 1937, during vacation time, for the reason that it is void on its face. The following are most, but not all, of the grounds urged to support petitioner's contention in his motion that the judgment was void ab initio, thus being incapable of creating, bestowing, or extinguishing any rights and whose nullity cannot be waived. Tr. R. p. 1 to 3.

(Tr. R. p. ____ means State Transcript of Record and Fed. Tr. R. ____ means Federal Transcript of Record. The state District Court, by order, sent up to the Court of Civil Apppeals as an original exhibit the printed record consisting of two volumes and the various briefs filed by attorneys in the U. S. Circuit Court of Appeals)

(The order in which the reasons are given in the motion is not followed here.)

1. It is void because the September 28, 1925 contract, which was sought to be cancelled by the plaintiff in that suit, was void ab initio, since the contract is prohibited by Texas statutes, which fact also necessarily renders the said judgment void:

(a) the contract unlawfully attempts to delegate the managerial powers of the Pratt-Hewit Corporation vested by its charter and the laws of Texas and of Delaware with the directors of the corporation, to the directors of the corporation's competitor, the Houston Oil Company, said contract being also against public policy: (Tr. R. 4 to 5)

(b) the contract is prohibited by the Usury Statutes of Texas:

(c) the contract violates the Texas Anti-Monopoly and Anti-Trust laws and the Constitution of Texas, Art. I, Sec. 26. (Tr. R. 5)

2. While not contained in petitioner's motion, nevertheless, petitioner's proposed amended petition sets forth still another reason why the September 28, 1925 contract and the judgment of January 26, 1937 are void. Thomas H. Pratt, the dominant stockholder, secretary, and treasurer, director, and resident manager in Texas, who negotiated the alleged September 28, 1925 contract in behalf of his corporation, had disqualified himself and forfeited his right to represent his corporation in making that

instrument with the Houston Oil Company. For several months before the contract was made, at the time and also continuously thereafter until his death on September 3, 1938, he had daily secret private business dealings with the Houston Oil Company, unbeknown to the stockholders, which conflicted with the duty he owed his corporation and its stockholders. Briefly stated, these transactions consisted of the Houston Oil Company and its president paying to Thomas H. Pratt approximately $51,000. in cash and also securing for him a producing 3/32 interest in a 200 acre lease from which he realized, up to the time of his death in 1938, $125,000 or more. These allegations were pleaded in detail as set out in petitioner's proposed amended original petition (Tr. R. 10 to 17) and have not been denied or disputed at any time by the defendants. These facts were taken from the contracts and oil and gas lease assignments entered into between defendants and kept hid until produced by order of court, therefore they cannot be disputed. Furthermore, under a second court order, the Houston Oil Company permitted the examination of its book accounts which showed that the Houston Oil Company had accommodated Pratt wth four secret loans totaling $14.500. Those orders were made by U. S. district Court.

3. The judgment of January 26, 1937, even if it were otherwise legal, which is denied, is void also because of the manner in which it was attempted to be entered:

(a) This being a stockholders' action, it could not be dismissed "with prejudice" in vacation time without denying intervenor F. F. Dollert and the other stockholders and the Pratt-Hewit Corporation itself the right to carry on the litigation, if they so desired, without notice being first sent out to them under the direction of the Court and without giving them an opportunity to be heard before the case should be dismissed on the merits. There is nothing in the record to show that such notice was given that the case would be taken up in vacation time and dismissed with prejudice. (Tr. R. 32 to 37) In fact, no such notice was given or sent out (Fed. Tr. R. 804) and therefore, Dollert and the other stockholders who, with a few exceptions, live in Wisconsin, and the Pratt-Hewit Corporation, knew nothing about the entering of said judgment. The failure to give such notice denied petitioner, the stockholders, and the Pratt-Hewit Corporation the due process of law as guaranteed to them by the 14th Amendment of the United States Constitution.

(b) The petition of the plaintiff, among other things, charged Pratt with a violation of his trust. It is clear that the interests of Thomas H. Pratt as a defendant in this case were directly in conflict with the interests of his corporation which was the true plaintiff. Yet Pratt, through his private attorney, J. V. Vandenberge Jr., took it upon himself to file an answer for the Pratt-Hewit Corporation, which was signed by J. V. Vandenberge Jr. as its attorney and sworn to by Thomas H. Pratt. The latter individually filed his own private answer

which was sworn to by him and signed by his private attorney, J. V. Vandenberge, Jr. The Corporation being the true plaintiff, the latter attempted to appear for the plaintiff and also for the defendant. Pratt and his private attorney, J. V. Vandenberge Jr., as the record shows (Tr. R. 32 to 37), unlawfully and to the prejudice of the corporation, attempted to consent for the Pratt-Hewit Corporation in writing to the taking up of the case in vacation time and to the dismissal of the case with prejudice.

According to Texas statutes, until changed by the legislature about two years ago, no judge could take up and dispose of a civil action without the consent of all parties to the action. Art. 1915, Vernon Texas Statutes, 1928.

It was well settled in Texas before the law was passed that a judge could not, without the consent of all parties, dismiss a civil action in vacation time. 11 Tex. Jur. 816, 817 and 819.

The September 28, 1925 contract being void, inescapably the judgment is void. The contract being void in its inception, it and the judgments attempted to be issued thereon in both state and federal court are a complete nullity for they are incapable of being the subject of litigation. They confer no right to anyone. They bind nobody and are subject to *attack by a motion to dismiss* or *by attack in the case where the contract is the subject of litigation and where an alleged judgment has*

been obtained, or in any other court wherein any rights are claimed under the void contract and judgment. 25 Tex. Jur. p. 693, Freeman on Judgments, 5th Ed., Vol. 1, p. 643.

The September 28, 1925 contract and the alleged judgment of January 26, 1937 in the District Court of Refugio County left the two parties litigant, the Houston Oil Company and the Pratt-Hewit Corporation, in the same position that they were prior to September 28, 1925, the date when said contract was made, except as to the ½ interest in the 23,000 acres of oil and gas lease, in the two producing oil and gas wells, and the half of the oil and gas taken by the Houston Oil Company from underneath said leases in which it claimed and claims ownership, the Houston Oil Company on September 28, 1925 became and still is a *mere constructive trustee* with the Pratt-Hewit Corporation *its cestui que trust.*

The purpose of reciting the foregoing issues and giving a few of the uncontroverted and admitted facts in this application for certiorari is not primarily to show an insupportable decision on the face of the record on the merits of the issues but to prove to this Court that the *necessary result* of the course of procedure in the Court of Civil Appeals and also the Supreme Court of Texas in their silence as to these issues presented to them, involves a Federal question of substance, namely, a taking away and depriving petitioner, the stockholders, and the Pratt-Hewit Corporation of their valuable oil rights

in Texas without any judicial determination of the fact upon which alone such a deprivation could be justified and that said course of procedure also denies to the petitioner and the stockholders "the privileges and immunities" they possess as citizens of the United States, all contrary o the 14th Amendment of the United States Constitution, which gives this Court jurisdiction.

Attached to and made a part of petitioner's motion is his proposed amended petition whose main objectives are (Tr. R. 3 to 22)

1. to have the September 28, 1925 contract, the subject of this litigation, declared to be void because

(a) its provisions violated Texas Usury, Anti-Trust, and Anti-Monopoly statutes:

(b) it attempted to vest the managerial powers of the corporation, contrary to Texas statutes and the corporation's charter, with the directors of its competitor, the Houston Oil Company, one of the defendants in the case:

2. The Contract being void ab initio, it follows that the judgment is void and never has had any existence and could not bestow rights upon the defendants, nor could it be the basis of any litigation, except of a motion to have the same set aside and dismissed.

3. The contract is void because Thomas H. Pratt,

the dominant stockholder and resident manager who negotiated the contract with the Houston Oil Company in behalf of the Pratt-Hewit Corporation, had disqualified himself from making the contract for his corporation, because of his secret financial dealings with the Houston Oil Company, which constituted a flagrant violation of trust and duty. Tr. R. 10 to 17.

To impress with a constructive trust all of the property of the Pratt-Hewit Corporation, real and personal, which the Houston Oil Company took possession of allegedly by virtue of the September 28, 1925 pretended contract, from said date until this date, with the Houston Oil Company as constructive trustee and the Pratt-Hewit Corporation as cestui que trust.

5. For a reconveyance of all the real and personal property conveyed by the Pratt-Hewit Corp. to the Houston Oil Company from September 28, 1925 to date and for an accounting of all the oil and gas taken from underneath the 23,000 acres of oil and gas leases which the Pratt-Hewit Corporation had on September 28, 1925 from that date until this day.

6. For the cancellation of the stock of the Pratt-Hewit Corporation fraudulently transferred to Pratt by himself as secretary of that corporation as his alleged share of the oil venture, and now in the hands of parties other than purchasers in good faith.

Although all the defendants who originally were served or made their appearance in the case when it was brought, were served with the notice of the petitioner's motion, none of them appeared.

William H. Blades, the general attorney for the Houston Oil Company who represented the Houston Oil Company in the Federal case of Wert T. Reed et al vs. Houston Oil Company et al, and Ben F. Vaughan Jr., who is the general attorney for the Pratt-Hewit Corporation and likewise defended his corporation in the same case in the Federal Court, each made application to be permitted to appear as amicus curiae in the District Court of Refugio County and also in the Court of Civil Appeals as amicus curiae. Petitioner objected to their appearance in that capacity for the reason that they were the paid attorneys of their respective clients as just stated and therefore it was humanly impossible for them to appear in the capacity of disinterested parties. Both courts overruled petitioner's objection. (Tr. R. 27, 28) W. H. Blades made application to file his brief as amicus curiae in the Supreme Court of Texas in opposition to the application for writ of error. That court permitted him to leave his answer and suggestions as amicus curiae with the clerk but denied him the right to make the same a part of the record.

The defendants, therefore, are in default. This carries with it the presumption that all the allegations well pleaded by petitioner are true. However,

petitioner does not need such a presumption, for the records by which petitioner is proving his case are those written, executed, and kept secret from the stockholders until dug up and produced by the Houston Oil Company through court order issued by the Federal District Judge in the case of Wert T. Reed, et al vs. Houston Oil Company, et al in the year 1940.

II.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C., Section 344 (Section 237 Jud. Code Amended) Subdivision (b) and the 14th Amendment of the Constitution of the United States.

This Court has jurisdiction because the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, San Antonio, erred in its refusal to make a determination of the various issues presented by petitioner's motion to the District Court, the necessary result of the course of procedure thus followed in that court being a denial of the rights of petitioner and the other stockholders, a taking away from and depriving them of their valuable oil properties without judicial determination of the facts and the law upon which alone such deprivation could be justified, and also denying to petitioner and the stockholders the privileges and immunities they possess as citizens of the Unit-

ed States, all contrary to the 14th Amendment of the Constitution of the United States. This case therefore presents an important and substantial question of Federal law.

The judgment of the Civil Court of Appeals appealed from is a judgment by the highest court of the state of Texas in which a decision could be had on the issues presented in petitioner's motion. (Articles 1819, 1820, 1821 Vernon's Statutes of Texas) Petitioner made a motion for a rehearing in the Court of Civil Appeals which was denied without an opinion. Application for a writ of error to the Supreme Court of Texas was filed with that court. This was denied by the Supreme Court of Texas without opinion. Petitioner then made a motion for a rehearing. This, too, was denied without an opinion. Thus all remedies in the state courts of Texas have been exhausted.

III.

Question Presented

The question presented is this, whether the Court of Civil Appeals in its *failure* to determine and decide the jurisdictional issues presented to it, namely, that the alleged September 28, 1925 contract and the judgment entered thereon in the District Court of Refugio County on January 26, 1937 are void because

(a) the contract unlawfully attempts to dele-

gate the managerial powers of the Pratt-Hewit Corporation vested by its charter in the laws of Texas and Delaware to the corporation's competitor, the defendant Houston Oil Company, said contract being also violative of public policy:

(b) the contract is prohibited by the Usury Statutes of Texas:

(c) the contract violates the Texas Anti-Monopoly and Anti-Trust laws and the Constitution of Texas, Art. I, Sect. 26:

(d) Thomas H. Pratt, the dominant stockholder, secretary and treasurer and resident manager in Texas, who negotiated the alleged September 28, 1925 contract, had disqualified himself from representing his corporation in the making of that instrument because he, at the time, was having secret continuous financial dealings with the Houston Oil Company, thereby placing private interest in conflict with the duty he owed his corporation:

(e) the judgment of January 26, 1937, dismissing the complaint with prejudice, is void, this being a stockholders' action and being taken up in vacation time, petitioner and the stockholders and the Pratt-Hewit Corporation not having been given the notice to which they were entitled that the case was being taken up in vacation time and was to be dismissed with prejudice; and further that the Pratt-Hewit Corporation was entitled to be represented in this matter, not by Thomas H. Pratt, who

was also a defendant in the case, and not by his private attorney, but by some stockholder who was not a defendant; does (Court of Civil Appeals) not thereby absolutely deprive petitioner and the stockholders of the Pratt-Hewit Corporation and the corporation itself of their valuable oil properties situated in Texas without any judicial determination of those jurisdictional issues, contrary to the Due Process Clause of the 14th Amendment of the Constitution of the United States, and thereby also absolutely deny to petitioner and the stockholders "the privileges and immunities" to which they are entitled as citizens of the United States in violation of the 14th Amendment of the United States Constitution. *Fayerweather* v. *Ritch*, 195 U. S. 276, 25 S. Ct. 58, 49 L. Ed. 193. *Chicago, Burlington etc. R. R.* v. *Chicago*, 166 U. S. 226.

IV.

Reasons Relied on for the Allowance of the Writ

The question whether the September 28, 1925 contract and the judgment entered thereon on January 26, 1937 by the District Court are void is a jurisdictional issue, one which, whenever presented, it becomes the duty of the Court to determine, whether in trial or appellate court or in the Supreme Court of the state or this Court. This is particularly so when the failure of the Court to do its duty necessarily deprives the litigant of his property or denies him the privileges and immunities to which all citizens of the United States are entitled. The issues presented to the Court of Civil Appeals involve prop-

erty and civil rights of substance which do not lie within the judicial discretion of a court to ignore. Furthermore, the action of the Court of Civil Appeals constitutes a violation of Rule 451 of the Rules of Practice and Procedure in Civil Action promulgated by the Supreme Court of Texas and which were in effect at the time that the Court of Civil Appeals rendered its decision. This rule, which is the same as Art. 1876 of the Revised Statutes of Texas, except for minor textual changes, reads as follows:

> "The Courts of Civil Appeals shall decide all issues presented to them by proper assignments of error by either party, whether such issues be of fact or of law, and announce in writing their conclusions."

The question of jurisdiction is always open in either the trial or the appellate court and it is the duty of the court to make its determination of the question whenever raised.

> "Want of jurisdiction of the subject matter of the suit will arrest a cause at any stage of the proceeding." Ableman et al v. Bloomfield, 6 Tex. 263. Evans v. Pigg, 28 Tex. 587, 591, Chicago B. & Q. Ry. Co. v. Willard, 220 U. S. 413, 55 L. Ed. , 31 Sup. Ct. 460.

When the Court of Civil Appeals completely ignores the jurisdictional issues presented to it and then finds that the petitioner's motion was a motion for a new trial, which had come too late, it begs the question because it assumes that the September 28, 1925 contract and the judgment decreed thereupon and all the proceedings in the court are valid when the petitioner's motion charges that they are all void and cannot create any rights. A motion for a new trial assumes that the Court had jurisdiction of the subject matter which in this instance is strenuously disputed. Before the Court of Civil Appeals could make the decision which it did, it was in duty bound to decide the issues submitted to it. Petitioner, in both Federal and Texas courts, has repeatedly raised these issues, yet every court has treated them with silence. Likewise, defendants' attorneys have never attempted to answer petitioner's contentions in support of the main issue and its subordinate ones. Also the attorneys for the defendants at no time disputed the facts in the case as presented by petitioner. Of course that was impossible as they could not very well dispute the contracts and oil and gas lease assignments executed and secreted by their clients.

The vice resulting from the failure of the various courts to make a judicial determination as to the main jurisdictional issue and its sustaining sub is-

sues is not that their decisions may be incorrect but that NO judicial determination of the questions was made. That failure resulted in bringing into this litigation a federal question of real substance, namely, the taking of the property of the petitioner and the stockholders and the Pratt-Hewit Corporation and giving it to the Houston Oil Company which, without a judicial determination, could not be justified and could not meet the requirements of the "due process of law" and the "privileges and immunities" clause of the 14th Amendment of the Constitution of the United States.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Court of Civil Appeals in and for the 4th Judicial District of Texas, at San Antonio, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Civil Appeals had in the case, numbered and entitled on its docket, No. 11,394, styled *F. F. Dollert, et al, appellant* v. *Pratt-Hewit Oil Corporation et al*, appellees, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment herein of said Court of Civil Appeals in and for the 4th District of Texas at San Antonio, be reversed by this Court

and for such further relief as to this Court and for such further relief as to this Court may seem proper.

Dated this day of January, 1945.

ARTHUR H. BARTELT
Attorney for Petitioner
P. O. Box 190
Austin, Texas
DANIEL W. HOAN
152 W. Wisconsin Avenue
Mliwaukee, Wisconsin
Of Counsel

LUTHER M. BICKETT
Alamo Nat'l. Bank Bldg.
San Antonio, Texas
Of Counsel